LAI CHIN WAH & ANOR v. SITRAC CORPORATION SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
S NANTHA BALAN JCA
NORDIN HASSAN JCA
[CIVIL APPEAL NO: C-02(NCvC)(W)-607-03-2021]
3 MAY 2023

Abstract – *The Contracts Act 1950 generally deals with the terms that parties may freely agree with one another and any protection afforded is more of a personal right which parties, under the same contractual principles of freedom to contract, may decide to waive. However, where the rights are conferred by other specific statutes, the court would have to ask further questions as to whether the rights conferred are purely personal or do they serve a higher and broader public purpose as maybe gathered from the statute.*

CONTRACT: *Sale and purchase of land – Deed of covenants – Deed of covenants executed between developer and purchaser provided that purchaser cannot apply for change of category of land use – Purchaser applied for change of category of land use from 'agriculture' to 'building' for land purchased – Application approved by State Authority – Whether parties could contract out of statute – Whether developer and purchaser could enforce such term in agreement – Whether contrary to public policy – Contracts Act 1950, s. 24(b) & (e)*

LAND LAW: *Covenants – Deed of covenants – Land use – Change of category – Deed of covenants executed between developer and purchaser with sale and purchase agreement provided that purchaser cannot apply for change of category of land use – Purchaser applied for change of category of land use from 'agriculture' to 'building' for land purchased – Application approved by State Authority – Whether parties could contract out of statute – Whether such term in agreement enforceable – Whether contrary to public policy – Contracts Act 1950, s. 24(b) & (e)*

The respondent ('plaintiff') had subdivided various titles of land, which it owned, into smaller lots for sale to the public. The plaintiff held itself out in the deed of covenants ('DOC') as a developer of a mixed development project, known as 'Tanarimba Janda Baik' to be developed on all those pieces of land. The plaintiff sold one piece each of the subdivided land to the first appellant ('first defendant') and the second appellant ('second defendant') *ie,* Lot A323 and Lot A324, respectively. The subdivided titles were registered in the defendants' names. The second defendant then transferred her title in Lot A324 to the first defendant. After the SPAs were signed and before the registration of the titles in the defendants' names, the plaintiff required the defendants, as purchasers, to sign a DOC each with it. The first defendant

saw a number of homestays or resorts being built by other owners in Tanarimba. His enquiry revealed that the plaintiff had its own resort. Having confirmed with his lawyers that there were no express or implied conditions in interest endorsed on the subdivided titles that would prohibit such an application for conversion, the first defendant built his own resort on Lots A323 and A324. The first defendant applied for a change of the category of land use for both Lots A323 and A324 to 'building' under s. 124(1)(a) of the National Land Code ('NLC'). The officer of the Director of Land and Mine, Pahang informed the first defendant that his application had been approved and with that, the category of land use was changed from 'Pertanian (Dusun)' to 'Bangunan Perniagaan-Resort'. Following the successful conversion, the first defendant applied for the approval of building plans. At the High Court, the plaintiff commenced a claim against the defendants and sought a declaration that the defendants had breached the terms of the DOC as the defendants had agreed not to: (i) use a building plan which was not approved by them to construct buildings on Lots A323 and A324; (ii) conduct commercial activities on Lots A323 and A324 which were agricultural lands; and (iii) apply to change the category of land use of Lots A323 and A324. The High Court allowed the plaintiff's claim and granted the declaration sought. In this appeal, the issues that arose were whether the term in the contract prohibiting application for change of category of land use would be void and unenforceable under s. 24(b) and (e) of the Contracts Act 1950 ('Act').

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The court did not think that s. 206(3) of the NLC, which reads that nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to any alienated land or interest therein, could be stretched and read as permitting the continuing operation of the restrictive covenants once the title is already registered in the purchaser's name as the proprietor of the land and the vendor has received its full purchase price and thus, had no more interests or rights over the land. To allow the term of the DOC to be enforced by the vendor would be to defeat the law under s. 24(b) of the Act. Any term of a contract that violates s. 24(b) of the Act would have to be struck down and it would be a very rare case where a court of law would uphold a contract which is repugnant to statutory rights, in this case, the NLC. Since cl. 1.2 of the DOC, the main plank of the plaintiff's case, was void by virtue of s. 24(b) of the Act, the other clauses that have a similar effect of defeating the purpose of the law would have to fall too. The various clauses referred to in the SPA and the DOC, which the plaintiff complained that the defendants had breached were in the nature of terms which, if enforced, would defeat the relevant provisions of the

NLC and the policy of the Torrens system of registration of land titles where the title and all the terms and conditions and restrictions in interest endorsed on it is everything. (paras 89-91 & 96)

(2) Where the title is everything under the Torrens system of title by registration, the developer at the very least must, in their application for subdivision, apply for a restriction in interest to be endorsed in all the subdivided titles that there shall be no application made for change of category of land use and that any transfer of the land shall be with prior consent in writing of the original proprietor/developer. The court doubted such a restriction in interest would have been allowed by the State Authority for such restrictions would unduly affect the purchasers' rights under the NLC. The State Authority would be in the best position to decide if prohibiting the purchasers of the subdivided lands from applying for a change of category of land use to 'building' would be contrary to any plan approved by the State Authority for the development of the area in which the land is situated. What the developer cannot do officially and legally, they cannot seek to do by the back-door method under a so-called contractually agreed waiver of those rights by the purchasers. (para 109-111)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Bandar Eco-Setia Sdn Bhd v. Angelane Eng [2016] 3 CLJ 173 FC ***(refd)***

Fitt v. Luxury Development Pty Ltd [2000] VSC 258 ***(refd)***

Johnson & Anor v. Moreton [1978] 3 All ER 37 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Lee Poh Choo v. SEA Housing Corporation Sdn Bhd [1981] 1 LNS 25 ***(refd)***

Lim Sok Wah v. Lim Boon Cheow & Anor And Another Appeal [2021] 10 CLJ 52 CA ***(refd)***

Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal [2020] 7 CLJ 720 CA ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***

Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26 PC ***(refd)***

Perbadanan Pengurusan Endah Parade v. Magnificient Diagraph Sdn Bhd [2014] 5 CLJ 881 CA ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 CA ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

A *Tam Kam Cheong v. Stephen Leong Kon Sang & Anor [1979] 1 LNS 108 FC* ***(refd)***
Tulk v. Moxhay (1848) 2 Ph 774 ***(refd)***
Woon Brothers Construction Sdn Bhd v. Mewah Rembang Sdn Bhd [2009] 1 LNS 1015 HC ***(refd)***

Legislation referred to:

B Contracts Act 1950, ss. 24(a), (b), (e), 29, 86
Employment Act 1955, s. 7, 7A
Federal Constitution, art. 13
Housing Development (Control and Licensing) Amendment Act 2007, s. 22D
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), Schedule G, Schedule H
C Moneylenders Act 1951, ss. 15, 17, 17A, 29A
National Land Code, ss. 115, 124(1)(a), 135, 136(1), 146, 206(1), (3), 214
Strata Management Act 2013, s. 149
Strata Titles Act 1985, s. 34

For the appellants - Chong Yik Long, Mohd Haire Mohd Kamaruddin & Olivia Gan Jye Shin; M/s Ng & Tina
D *For the respondent - Tan Keng Teck & Harvey Ng Yih Xiang; M/s Lim Kian Leong & Co*

[Editor's note: For the High Court judgment, please see Sitrac Corporation Sdn Bhd lwn. Lai Chin Wah & Satu Lagi [2019] 1 LNS 1108 (overruled).]

E *Reported by Lina E*

JUDGMENT

Lee Swee Seng JCA:

F **[1]** The circumstances under which the court may intervene with the freedom of contract are limited. It is easier to intervene in cases of illegality where parties cannot agree to do that which the law prohibits. What then is the position where a matter is not prohibited by statute but expressly stated as a right of a party?

G **[2]** The question then is whether contracting out of a statute would be permitted. Should the court nevertheless refuse to enforce such a term if to do so would unfairly prejudice the rights of the weaker party to the bargain, or that it would defeat the purpose of the law or be contrary to public policy. Interestingly in this appeal, the issue is whether a developer can enforce a term in an agreement where the purchaser has agreed not to apply for change
H of category of land use from "agriculture" to "building" for the land that he purchased.

[3] The purchasers here had obtained the approval of the State Authority for such a conversion and have constructed, with the approval of the local
I authority, on the once agricultural land a long house straddling the two pieces of land, one bought by the husband and the other by the wife, from the developer and which the wife subsequently transferred to the husband.

[4] The developer insisted that it is a breach of the contract represented in the sale and purchase agreement ("S&P") and the deed of covenants ("DOC") signed between the developer and the purchaser for each parcel of the agricultural land in the development in Janda Baik in Pahang.

[5] The purchasers argued that the National Land Code ("NLC") conferred such a right to the registered proprietor, and whilst the S&P and DOC had been entered into, very significantly this so-called restriction does not appear on the subdivided titles when they were subsequently issued. It was argued that the contractual restrictions cannot take away the rights of the purchasers as reflected in the subdivided titles without such a restriction, and moreover, the NLC expressly grants such a right to the registered proprietor of the land.

At The High Court

[6] The High Court heard a witness each from the plaintiff and the defendants. One Lisa Ng (PW1) testified for the plaintiff and Lai Chin Wah (DW1) who was the first defendant (D1) gave evidence for the defendants. The High Court was of the view that the contractual terms are clear and binding on the contracting parties and it is not open to the purchasers to resile from the agreed terms.

[7] The High Court on 17 March 2021 allowed the plaintiff's claim and granted the declarations prayed for in that the defendants had breached the relevant clauses in the S&P and DOC and the injunctive reliefs prayed for and made an order for the specific performance of the contract, ordering the demolition of the long house built straddling the two titles to the contiguous lots.

[8] The High Court however held that the plaintiff had failed to prove that it has suffered damage as a result of the defendants' breaches of the various clauses referred to.

[9] Aggrieved by the said decision, the purchasers as appellants appealed to the Court of Appeal and there was a consent order recorded for a stay of the High Court order for the demolition of the long house built pending the disposal of the appeal.

At The Court Of Appeal

[10] It was argued before us that the consideration or object of the agreement is of such a nature that, if permitted, would defeat any law and/or be opposed to public policy pursuant to s. 24(b) and (e) of the Contracts Act 1950.

[11] It was argued that though the relevant sections of the NLC that confer rights on a registered proprietor did not have an expressed prohibition against contracting out or making any inconsistent contract terms to be void to the

A extent of its inconsistency, yet to allow a contractual term in the nature of waiving a statutory right would be to defeat the purpose of the law and more so when the right is obviously spelt out to protect the weaker party.

[12] It was also argued that to allow such a contracting out of statute conferring a right to the registered proprietor would be contrary to public
B policy in that it would introduce uncertainty into the Torrens system of land transaction and registration where the title is everything and that one does not have to go behind the title to find out if there are other conditions that bind the titles in question.

C **[13]** It was also impressed upon us that the registered proprietor, irrespective of whatever he may have agreed upon with respect to terms binding upon the title, would have a right to proceed on the basis, when a title is issued, that contractual terms binding on the parties which are not endorsed on the title in the express conditions or restrictions in interest, would be deemed to be no longer applicable and binding on the registered
D proprietor of the title.

[14] The appellants also attempted to prevail upon us that the prohibition imposed contractually in the agreements would be contrary to public policy as it would permit a term contrary to the expressed right of a registered
E proprietor to be binding on the proprietor perpetually such that he cannot validly sell and transfer the title to another without being in breach of the agreement if he does not procure that the subsequent buyer does sign another DOC with the developer agreeing to the same prohibition against applying for conversion and change of category of land use from "agriculture" to "building".

F

[15] The core issue, in this case, is whether the court should enforce contractual terms which are restrictive of and which abrogate the rights of the registered proprietor whose title, when issued, does not have any express condition of land use or restriction in interest that prohibits the registered
G proprietor from in this case, applying for conversion of land use and or subdivision and amalgamation of contiguous lots.

[16] If the defendants as purchasers and registered proprietors can show that the consideration or object is of such a nature that, if permitted, would defeat any law and/or opposed to public policy pursuant to s. 24(b) and (e)
H of the Contracts Act 1950, then such a clause would be null and void and unenforceable. The parties shall be referred to as they were in the court below. The respondent shall be referred to as plaintiff and the first and second appellants collectively as defendants and individually as "D1" and "D2" respectively.

I

Whether The Term In The Contract Prohibiting Application For Change Of Category Of Land Use Would Be Void And Unenforceable Under s. 24(b) Of The Contracts Act 1950

[17] The plaintiff embarked on a novel project of subdividing the various titles of the land it owned into smaller lots for sale to the public. The plaintiff held itself out in the DOC as a developer of a mixed development project known as "Tanarimba Janda Baik", to be developed on all those pieces of land aggregating about 1,399.5 acres in Janda Baik, Mukim Bentong, Pahang. The plaintiff provides basic infrastructures such as access roads, main road reserves, main drains, water supply works, streetlights, electricity supply works and telephone mains.

[18] The plaintiff sold one piece of the subdivided land measuring 61,429 square feet to D1 for RM614,290 *vide* an S&P dated 29 August 2012. The lot was identified as Lot A323 held under H.S. (D) 9915, PT 13790, Mukim Bentong, Daerah Bentong, Negeri Pahang.

[19] D1's wife, Soong Chow Har, who was the second defendant, D2, in the High Court, bought an adjacent piece of the subdivided land measuring 46,005 square feet from the plaintiff for RM460,050 pursuant to an S&P of the same day. The lot was identified as Lot A324 held under H.S. (D) 9916, PT 13791, Mukim Bentong, Daerah Bentong, Negeri Pahang.

[20] As expected, the S&P was a standard form prepared by the plaintiff and so the terms and conditions were identical in the two S&Ps save for the purchase price and the particulars of the subdivided title and the purchaser's particulars. The defendants fully paid for the two pieces of land and subsequently the subdivided titles were registered in the defendants' names on or about 1 February 2013. The wife, D2, transferred her title in Lot A 324 to the husband, D1, on 19 May 2017.

[21] After the S&Ps were signed and before the registration of the titles in the defendants' name, the plaintiff required the defendants as purchasers to sign a DOC each with it.

[22] In 2015, D1 saw a number of homestays or resorts being built by other owners in the Tanarimba. His enquiry revealed that the plaintiff has its own resort named the Enderong Resort. D1 consulted his lawyer on whether the relevant terms of the S&P and the DOC would have been overridden by the NLC when the individual titles were subsequently registered in their names and, more particularly, the registered proprietor's right to apply for a change of category of land use and in this case from "agriculture" to "building". The answer was that contractual agreements whose terms are inconsistent with the NLC cannot override the NLC.

[23] Having satisfied himself as confirmed by his lawyer that there were no express or implied conditions or restrictions in interest endorsed on the subdivided titles that would prohibit such an application for conversion, D1 was emboldened to build his own resort on Lot A323 and A324 called "Peppaville Resort." According to the defendants, the concept of Peppaville Resort blends well into the tropical rainforest park and eco-tourism promoted by the plaintiff in their development of Tanarimba Janda Baik and that rather than changing the character of the development, it would, in reality, enhance the development with more facilities available to the tourists and holiday makers.

[24] As the subdivided titles were issued and registered in the name of the defendants subsequent to the S&P and DOC, it is reasonable for the defendants to proceed on the basis that the titles contain all the terms and conditions with respect to the use of the land and the restrictions in interest, if any, that are reflected on the title.

[25] D1, on 28 March 2018, exercised his statutory right and applied for change of the category of land use for both Lots A323 and A324 to "Building" under s. 124(1)(a) of the NLC. The office of the Director of Land and Mine, Pahang by its letter of 11 October 2018 informed D1 that his application had been approved by the Majlis Mesyuarat Kerajaan ke-29/2018 on 26 September 2018 and with that, the category of land use was changed from "Pertanian (Dusun)" to "Bangunan Perniagaan-Resort" which translated into English would mean changed from "Agriculture (Orchard)" to "Building (Commercial – Resort)".

[26] There was a requisite premium of RM468,527 which was duly paid by D1. There was also the corresponding change in the express conditions of the land held under the titles to Lot A323 and A324 from:

> Tanah yang diberimilik ini semata-mata untuk kegunaan pertanian (dusun) sahaja. Kawasan yang akan dibangunkan tidak dibenarkan menebang atau memotong kayu kayan yang terdapat dalam kawasan ini kecuali kawasan tapak rumah atau bangunan lain yang dibenarkan sahaja.

to:

> Tanah ini hendaklah digunakan untuk Bangunan Perniagaan (Hotel/Resort/chalet Sahaja).

[27] As narrated by the defendants, following the successful conversion, D1's application for approval of building plans *via* his architect, Ahmad Asmadi Architect, was also approved by the Majlis Perbandaran Bentong on 29 January 2020. D1 said he spent RM10 million to construct and complete Peppaville Resort and to furnish it.

[28] The plaintiff claimed that the defendants had breached the terms of the DOC as the defendants had agreed not to:

(i) use building plan which was not approved by them to construct buildings on A323 and A324;

(ii) conduct commercial activities on A323 and A324 which were agricultural lands;

(iii) apply to change the category of land use of A323 and A324;

(iv) that D2 is bound to ensure that her subsequent purchaser (*ie*, D1) executes a DOC with the plaintiff.

[29] As regards D2, her breach was that she had agreed not to sell to her subsequent purchaser without first getting the subsequent purchaser to execute another DOC with the plaintiff. As stated, D2 had transferred her lot to D1.

[30] The plaintiff had claimed against the defendants in the Temerloh High Court for a declaration that the defendants had breached the S&P and DOC and for an injunction to have the resort demolished as well as for assessment of damages which the High Court granted after a full trial. There was, pending an appeal by the defendants to the Court of Appeal, a consent order for a stay of the execution of the judgment dated 17 March 2021 except for declaratory reliefs (which by law cannot be stayed) pending the disposal of this appeal upon the defendants' undertakings that they shall not operate Peppaville Resort and conduct any commercial activities on A323 and A324 in the meantime.

[31] The critical terms of the S&P and the DOC shall now be examined. They are as follows:

(i) clause 13(2) of the S&P:

> The Purchaser hereby further covenants with the Vendor that in the event of any assignment, transfer, sale or disposal of the Property by the Purchaser to a third party, the Purchaser shall ensure that such third party shall, at the cost and expense of such third party, likewise covenant with the Vendor to be bound by the Covenants and to enter into a Deed of Covenants …

(ii) clause 1.2 of the DOC:

> The Covenantor shall not apply for conversion of the category of use of the Property from its present category of use.

(iii) clause 1.3 of the DOC:

> The Covenantor shall observe and comply with the express conditions in respect of the Property and such implied conditions under the National Land Code, 1965 as shall be consistent thereto.

(iv) clause 2.2 of the DOC:

> The Covenantor shall, at its own costs and expense, apply for and obtain the approval of the Appropriate Authority for the Selected Plan.

Selected plan was described as a set of six building plans, drawings and specifications in respect of six different types of dwelling houses annexed as the Third Schedule in the DOC (see cl. 2.1 of the DOC).

(iv) clause 2.5 of the DOC:

> The Covenantor undertakes that the House shall be built on the Property in a good and workmanlike manner in accordance with the Selected Plan as shall be approved by the Appropriate Authority and in conformity with the provisions and requirements of any written law or regulation for the time being in force affecting such building and to these Covenants.

[32] The plaintiff's case is that the defendants had breached all the above provisions of the S&P and the DOC when they built Peppaville Resort and conducted commercial activities on the two lots. The High Court had granted the reliefs including a mandatory injunction order to compel the defendants to reverse the process of the land conversion *ie*, to re-apply to change the category of land use back to agricultural and to demolish the resort building of Peppaville Resort.

[33] The defendants contended that the relevant provisions in the S&P and DOC are unlawful and void as they are of such a nature that, if permitted, would defeat any law and/or are opposed to public policy pursuant to s. 24(b) and (e) of the Contracts Act 1950 which reads as follows:

> **24. What considerations and objects are lawful, and what not**
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) **it is of such a nature that, if permitted, it would defeat any law;**
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another, or
>
> (e) the court regards it as immoral, or **opposed to public policy.**
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. **Every agreement of which the object or consideration is unlawful is void.** (emphasis added)

[34] Granted that in this particular case there is no express prohibition against the taking away of such a statutory right under the NLC. It is of course, a much clearer case if the object of an agreement is forbidden by a law as referred to in s. 24(a) of the Contracts Act 1950 in that there is a

specific provision of the law that prohibits such an object or act. However, there is no need for an express prohibition or even a sanction of a penalty or fine or the criminalising of an act, before such an agreement is void for reason that its object or consideration is unlawful. Section 24(b) itself provides that if the consideration or object is of such a nature that, if permitted, it would defeat any law, would also be unlawful and the agreement void.

[35] The Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 summarised the position of the law in s. 24 of the Contracts Act 1950 as follows:

> [16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by a law; *(b) it is of such a nature that, if permitted, it would defeat any law;* (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or, (e) the court regards it as immoral, or *opposed to public policy.* 'In each of the above cases, *the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void* ... The provisions of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras. (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; *para. (b) deals with what could defeat the object of any law; and para. (e) deals with public policy'* (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court), which statements 'continue to be good law' (*Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors* [2000] 3 MLJ 95, at p105 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). '... consideration is unlawful if it is forbidden by law, or is of such a nature that, if permitted, would defeat the provisions of any law or is immoral or opposed to public policy. *Unlawful consideration is a defence against the plaintiff. Consideration opposed to public policy is illegal, and contracts founded on them are condemned by law. An agreement to be at variance with public interest it is said, must be clearly and indubitably in contravention of public policy* (*Chong Kow v. Kesavan Govindasamy* [2009] 8 MLJ 41, Mohd Ghazali J, as he then was).
>
> ...
>
> [19] It is perfectly settled, that *where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give effect* (*Cope v. Rowlands* (1836) 2 M&W 149, at p. 157 per Parke B, which was quoted with approval in *Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 MLJ 301 per Ramly Ali FCJ, delivering the judgment of the court). 'Under s. 2(g) of the Contracts Act 1950, an unlawful agreement is not enforceable' (*Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 per Edgar Joseph Jr FCJ, delivering the judgment of the court). (emphasis added)

[36] Where a statute grants a right to a person, it does so precisely because if left to the parties, there is a danger of the stronger party taking away the rights of a weaker party in the so-called agreement where the weaker party has not much negotiating power. One must of necessity proceed from the premise that statutes are passed and put in place by the legislators to safeguard the rights and interests of the parties that would need the protection afforded by the law. Conversely, without such statutory protection of the rights being spelt out, the weaker party would be at the mercy of the stronger party who would be dictating the terms including that of waiving one's rights under the law.

[37] To allow parties to contract out of an Act of Parliament would be to allow parties to thumb their nose at the Legislators and effectively to circumvent the intention of the Legislators. In the case of a comprehensive code relating to land rights, uses and dealings, Parliament has an interest in ensuring certainty in land dealings and for the orderly development of land in Malaysia.

[38] There are various ways in which Parliament conveys the message in the legislation that certain acts are prohibited either expressly by stating that it is illegal, unenforceable, or that it is an offence or that there is a prohibition against contracting out.

[39] Thus, for instance, in cases of social legislation, there would be express provisions in the statute to say that any terms and conditions that are less favourable than what is provided for under the Act or the regulations made under it would be void and of no effect. See, for example, s. 7 and s. 7A of the Employment Act 1955.

[40] In cases where a new Act would come into force, Parliament is conscious that in the past, a seller or developer may have incorporated terms in the S&P and DOC such that such a term, if allowed to continue, would defeat the purpose of the new legislation. Therefore, in the case of the Strata Management Act 2013 ("SMA") there is an express prohibition against contracting out as follows:

> **Contracting out prohibited**
>
> 149(1) The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this Act.
>
> (2) No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this Act shall operate to annul, vary or exclude any of the provisions of this Act.

[41] In cases where there has been a blatant violation of the law and where the weaker party is most vulnerable in the case of being charged exorbitant interest by a loan shark, Parliament has not only criminalised general

offences with fines or imprisonment or both as in s. 29A of the Moneylenders Act 1951 but has also declared certain non-compliance with the Act to be illegal and unenforceable such as under ss. 15, 17 and 17A of the Moneylenders Act 1951 as follows:

> **15 Contract by unlicensed moneylender unenforceable**
>
> **No moneylending agreement** in respect of money lent after the coming into force of this Act by an **unlicensed moneylender** shall be **enforceable.**
>
> **17 Prohibition of compound interest**
>
> (1) Any moneylending agreement made on or after the commencement of this Act, for the loan of money by a licensee shall be illegal in so far as it provides, directly or indirectly, for the payment of compound interest, or for the rate or amount of interest to be increased by reason of any default in the payment of sums due under the moneylending agreement:
> …
>
> **17A Interest for secured and unsecured loans**
>
> (1) For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum.
>
> (2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.
>
> (3) Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is **more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.**
>
> (4) Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both. (emphasis added)

[42] In the case of the Housing Development (Control and Licensing) Regulations, a developer cannot change the Schedule G or H of the prescribed S&P to more than 24 months or 36 months from the date of the S&P for practical completion of the landed property or strata high rise property, as the case may be, without the consent of the Minister. It is no defence to the developer to say that the purchaser had consented to this extended period of practical completion when they signed the S&P and that they could have refused to sign if they were not agreeable. Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 reads:

A 11. Contract of sale.

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing
B accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[43] As far back as the case of *Lee Poh Choo v. SEA Housing Corporation Sdn Bhd* [1981] 1 LNS 25; [1982] 1 MLJ 324, Mohamed Dzaiddin JC (later CJ) (as he then was), had stated.

C As I have stated earlier the Housing Developers (Control and Licensing) Act 1966 and its 1970 Rules were introduced for public interest to regulate and control business of housing developers. In my opinion the Act and the rules must be strictly followed.

[44] His Lordship also quoted with approval the case of *Johnson & Anor*
D *v. Moreton* [1978] 3 All ER 37 as follows:

On page 56 Lord Simon stated as follows:

The principle which, in my view, emerges from this line of authority is as follows. Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which relations of parties cannot
E properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (*albeit* exclusively in his own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter.

F **[45]** Thus in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852 at p. 626 (CLJ); p. 859 (MLJ), the Court of Appeal in dealing with a dispute over a Schedule H statutory contract prescribed under the regulations (which is the equivalent of Schedule G in respect of condominiums and such stratified developments)
G observed as follows:

The contract which has fallen for construction in the present case is a special contract. It is prescribed and regulated by statute. *While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form*
H *H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed.* So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.
(emphasis added)

[46] The Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan*
I *Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60 further emphasised that where the provision of the law is to protect the

weaker party, the court will interpret its effect consistent with its paternalistic purpose to uphold the rights of the weaker party and only to declare the offending clause void and not the whole contract as follows:

> [76] Thus, it can be said that the general principle of law flowing from this discussion is as follows. When it concerns social legislation and the stronger side to the transaction has committed an illegal act, the existence of a penal provision does not automatically render the contract void. If that were so, then the legislation would, if it were taken to destroy the contract or to erase the weaker side's right to a remedy, be to defeat the very protective purpose for which it was enacted. *Accordingly, in such cases, the weaker party to the transaction will not be deemed to be in pari delicto and shall accordingly be entitled to the appropriate remedy. The natural result of this is that the stronger party will have that illegality construed against them.* The result of that exercise depends very much on the facts of a particular case.
>
> (emphasis added)

[47] Parliament and the court recognise that leaving it to the parties to agree would render the rights of purchasers illusory and subject them to being abused under the guise of the weaker party having agreed to it and so cannot now complain. See the case of the Federal Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 and the Court of Appeal case of *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720; [2020] 6 MLJ 191.

[48] Whilst we would not go so far as saying that the NLC is a piece of social legislation, we would nevertheless say that provisions like s. 124 of the NLC give a right to a proprietor of land to apply to the State Authority for change of category of land use is spelt out for the protection of the weaker party and deserves every protection.

[49] Likewise, in a case of a legal charge created under the NLC, the chargee bank cannot refuse to follow the protective provisions put in place to protect the chargor in the event of a default and a judicial sale such as a sale under the standard prescribed conditions of sale under the NLC for a sale by public auction on the ground that parties had agreed on a different method of disposing of charged land as security for a loan. In the Supreme Court case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274, Edgar Joseph Jr SCJ held as follows:

> The question whether a person entitled to the performance of a statutory duty can effectively *waive* performance of the duty by the person bound and the latter can effectively *contract out* if performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting *waiver* and contracting out. Trietel on Contract (at p. 782) has correctly pointed.

> Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute *(quilibet potest renunciare juri pro se introducto)* difficulties arise in determining whether the right is exclusively personal or is *designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates.* Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver. (emphasis added)

[50] *Kimlin* (*supra*) had referred to the Privy Council case of *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 LNS 26; [1984] 1 MLJ 222 where it was held that a surety to a guarantee is able to contract out of a statutory benefit conferred by s. 86 of the Contracts Act 1950. The statutory benefit which was conferred to a surety under s. 86 of the Contracts Act 1950 is that the surety under the guarantee will be discharged if there is a variance and modification of the terms of the contract between the creditor and principal debtor. There was of course, nothing preventing the surety from agreeing and consenting to the bank to vary or modify the terms of the contract between the bank and the borrower. It is thus not so much that s. 86 of the Contracts Act 1950 had been contracted out but that the surety had, when signing the guarantee, agreed and consented to the bank making the variation and modification to the contract.

[51] Thus, one can appreciate that generally, the Contracts Act 1950 deals with the terms that parties may freely agree with one another and any protection afforded is more of a personal right which parties under the same contractual principles of freedom to contract, may decide to waive. However, where the rights are conferred by other specific statutes, the court would have to ask the further question as to whether the rights conferred are purely personal or do they serve a higher and broader public purpose as may be gathered from the statute.

[52] Sometimes, the right is spoken of in the context of a prohibition against taking it away or it being waived. At other times, the act of non-compliance with a mandatory requirement is criminalised in the form of making it an offence subject to a fine or imprisonment or both upon conviction. Yet, at other times, it is stated that any terms of a contract inconsistent with a statute is, to the extent of the inconsistency, void and that the statute shall prevail. Even where there is no express or implied prohibition against contracting out, yet, if the provision in question is purposefully enacted to protect a weaker class of persons, in this case, registered proprietors of land or those who have paid the full purchase price for the land, then to allow contracting out of the statutory rights conferred would be to defeat the purpose of the law.

[53] Such was the approach taken in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [1999] 2 CLJ 1023; [1999] 3 MLJ 157 at p. 1053 (CLJ); p. 186 (MLJ) where the Court of Appeal posited as follows: A

> Turning to case law, on the subject of when contracting out of a statute may or may not be permitted, *Johnson v. Moreton* [1978] 3 All ER 37 *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 MLJ 222 *British Eagle International Airlines Ltd v. Compagnie Nationale Air France* [1975] 1 WLR 758 *Lee Kim Seng v. Acme Canning Sdn Bhd* [1977] 2 MLJ 141 and *Hj Taib v. Ismail* [1971] 2 MLJ 36 may be read with profit. B
>
> Applying the test thus propounded, an examination of the language of RHC O. 83 does not disclose any express or implied prohibition against a chargor from either waiving or contracting out of its terms. I must therefore next turn to examine the overall purpose of that provision. *It is clear to my mind that RHC O. 83 is a procedural law that exists for the protection of a class of persons, namely chargors of immovable property. That, I believe, is its overall purpose. To permit the respondents to waive or, as they have done by way of cl. 23.4 of the assignment, to contract out of its provisions would, in my judgment have the effect of defeating that purpose. It would therefore be contrary to public policy* to permit the respondents as members of the class for whose benefit RHC O. 83 exists from either waiving or contracting out of its provisions. C D
>
> (emphasis added)

E

[54] There is no good reason for anyone to take away from another person a right or entitlement that the law has granted to the weaker party simply by saying that the other party has freely, voluntarily given up or waived that right or entitlement under the law. A right or entitlement granted is always available for the grantee to decide when, if at all, he wants to exercise that right or entitlement. It is not for the stronger dictating party to require the weaker party to give up his rights and entitlement forever. F

[55] When and where the Parliament has decided to spell out the rights and entitlement of a person for protection, it would be rather hollow for anyone to argue that the parties to the contract should know better what would be in their mutual interest and once agreed, there is no reneging from it. Taking away from or requiring someone to give up his statutory rights would invariably have a sly slant or a less than *bona fide* bent to it. G

[56] Thus, in *Lim Sok Wah v. Lim Boon Cheow & Anor and Another Appeal* [2021] 10 CLJ 52 the Court of Appeal held that parties are incapable of contracting out of the provisions of the Distribution Act 1958 as this Act of Parliament was to protect beneficiaries to be granted their entitlements under the estate of a deceased without a will. H

[57] In the case of waiving the defence of limitation, that is a procedural matter which a defendant may decide whether to raise as a defence by specifically pleading it, for after all, the defendant may have a counterclaim which may well exceed the plaintiff's claim. Thus, we have no issue with the I

Court of Appeal case of *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; [1995] 3 MLJ 141 where it was held that a party is able to waive his right to raise the defence of limitation as conferred pursuant to the Limitation Act 1953.

[58] The converse is not true in that a stronger party cannot dictate that a claim must be brought within a period shorter than what the Limitation Act 1953 has prescribed for that may also offend s. 29 of the Contracts Act 1950 as was held by the Supreme Court in *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185 at p. 239 (CLJ); p. 195 (MLJ) as follows:

> … We do not think that a right can be dissociated from its remedy. We are therefore of the opinion that condition 19 of the fire policy contravenes s. 29 of the Contracts Act 1950. *The learned judge was therefore correct in holding that condition 19 of the fire policy is void by virtue of the imperative words of s. 29 of the Contracts Act 1950 as it clearly limits the time within which the respondent can enforce his right under s. 6(1)(a) of the Limitation Act 1953.*
> (emphasis added)

[59] Parliament proceeds from the premise that where people naturally do what is required of them as proper conduct, then no legislation is necessary. When Parliament legislates, it is precisely because if left to the parties, reasonable conduct of the parties would not be achievable to ensure certainty and fairness and in this case, uses and dealings in land as an incident of ownership. It has been observed jurisprudentially that where there are morals, the law would not be necessary and where there are none, the law would not be sufficient. Inadequate as the law may be, that is still the best means we have to govern society and regulate its affairs, relationships and businesses.

[60] In the present appeal, we are dealing with s. 124(1)(a) of the NLC which is reproduced below for its full terms and effects:

> **124 Power of State Authority to vary conditions, *etc*, on application of proprietor**
>
> (1) **The proprietor of any alienated land may apply to the State Authority** under this section for:
>
> (a) **the alteration of any category of land use** to which the land is for the time being subject or, where it is not so subject, for the imposition of any it is not so subject, for the imposition of any category thereon;
> (emphasis added)

[61] The rights protected here by Parliament are not just the power of a proprietor to apply to the State Authority to alter the category of land use but also the power of the State Authority to vary conditions of land use on an application by a proprietor. The natural question to ask is why would a vendor restrict the power of a purchaser of a piece of land from exercising

his right conferred on him by the NLC to apply for change of category of land use. To take away the proprietor's rights and entitlement here under the guise of the proprietor consenting to give up his rights and entitlement under the law, would indirectly take away the power of the State to vary the conditions of land use upon an application by the proprietor.

[62] We note that in the frequently asked question in the marketing brochure produced and given to purchasers to induce a purchase, the prohibition to apply for change of category of land use is not spoken of in the mandatory language of "shall not" but in the permissive language of "may not" as follows:

> Q: Can homestead lots be converted from "Agriculture" category of land use to another category?
>
> A: A purchaser may not convert its lot to another category of land use.

[63] Being not an absolute prohibition as represented in the Q&A, a purchaser like D1, with a heavy dose of entrepreneurship and resourcefulness, would try to exercise his right under s. 124 of the NLC to apply for change of category of land use and in this case, the State Authority did approve it and the local authority did approve his building plans.

[64] The court have no hesitation in striking down and rendering terms in a deed of mutual covenants that are inconsistent with the S&P or inconsistent with the rights of a registered proprietor of the land as being void and unenforceable. In *Woon Brothers Construction Sdn Bhd v. Mewah Rembang Sdn Bhd* [2009] 1 LNS 1015; [2009] MLJU 929, the High Court held that the provisions in a deed of mutual covenants which are inconsistent with the prescribed terms in the statutory sale and purchase agreement under the Housing Development (Control and Licensing) Regulations 1989 are illegal and unenforceable.

> *From a perusal of the questions of law raised and the facts of the case, the main issue of law appears to be the determination of the legality of the Deed of Mutual Covenants dated 14.4.95 which was entered into together with the Sale and Purchase Agreement between the appellant-purchaser and the respondent-vendor.*
>
> *It is not disputed that the Sale and Purchase Agreement is in the form and substance prescribed by Schedule H of the Housing Development (Control and Licensing) Regulations 1989, in particular Regulation 11(1), which is a subsidiary legislation under the Housing Development (Control and Licensing) Act 1966 [Act 118].*
>
> *There is no provision in the Sale and Purchase Agreement for the payment towards a sinking fund.*
>
> *After examining the Deed of Mutual Covenants I am of the considered view that cl. 5.02 and cl. 7.01 of the Deed are attempts to contract out of the prescribed form of agreement and cannot be allowed to stand.*

A *To the extent that the provisions of the Deed of Mutual Covenants are inconsistent with the Sale and Purchase Agreement these provisions are illegal and unenforceable against the purchaser …*

The plaintiff's claim, which is materially based on the Deed of Mutual Covenants, is therefore unenforceable against the defendant and must be dismissed. (emphasis added)

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[65] Upon full payment of the purchase price, the vendor of a piece of land would have exhausted all his rights upon the land sold and transferred to the buyer, who would become its new registered proprietor. Likewise, the NLC confers rights on a proprietor to deal with his land as he sees fit, whether it be to lease, transfer or charge the land and to use the land subject always to the conditions and restrictions in interests endorsed on the land title.

C

[66] Even in a case of a proper strata development, be it a high-rise or a landed strata development, the by-laws of the management corporation cannot violate the Strata Titles Act 1985 for by-laws are essentially subsidiary legislation as was held in *Perbadanan Pengurusan Endah Parade v. Magnificient Diagraph Sdn Bhd* [2014] 5 CLJ 881; [2013] 6 MLJ 343. If the developer had proceeded with a strata development of the landed property, a registered proprietor of a parcel, under s. 34 of the STA, shall have the powers conferred by the NLC on a proprietor in relation to his land and that would include the right to apply for change of category of land use under s. 124 of the NLC.

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[67] By way of analogy, one can borrow the concept of the doctrine of exhaustion of rights in intellectual property cases where once title is transferred to the buyer, be it a mobile phone or a car, the seller cannot for instance require the buyer to purchase spare parts from their authorised agent. It is for the buyer to decide what spare parts he wants to use in replacement of the original parts becoming defective. It is different if certain warranties are given on account only that the buyer uses the seller's original spare parts.

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[68] The High Court in the present case had placed great reliance on the Federal Court case of *Bandar Eco-Setia Sdn Bhd v. Angelane Eng* [2016] 3 CLJ 173; [2016] 1 MLJ 764. Though the facts may appear to be rather similar, yet, the issues argued and the principles of law relied on were totally different. *Bandar Eco-Setia* (*supra*) involved the enforcement by the appellant developer of a clause in the deed of mutual covenants ("DMC") which prohibits the respondent purchaser of a bungalow lot *inter alia* from building her house above the height limit of 12.192m. In that case, to meet her feng-shui needs, the respondent's house exceeded the height limit and stood at 14.497m. When the inspection was conducted by the appellant, the construction was already at an advanced stage. Although the appellant found the design of the bungalow to be in breach of the approved plan, the appellant

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nevertheless rewarded the respondent with a 5% rebate for the early completion of her house. The respondent submitted the owner occupancy registration form and then moved into the house with her family. However, shortly thereafter, the appellant issued a stop work order when the construction had been completed already and the respondent had moved into the house.

[69] The appellant had waited for another one year and four months before commencing an action against the respondent for a declaration that the respondent was in breach of the DMC and building guidelines. The High Court allowed the appellant's claim. On appeal, the Court of Appeal set aside the lower court's decision. Although the Court of Appeal agreed with the findings of breach of the DMC made by the learned trial judge, it was of the view that the learned trial judge had erred in law in failing to properly and adequately consider the equitable defences raised by the respondent such as the defences of estoppel, acquiescence and laches.

[70] Upon further appeal, the Federal Court reversed the decision of the Court of Appeal and granted the equitable relief of specific performance against the respondent. Factually, it was found that she had obtained the developer's approval for the building plans but then she later changed it unilaterally. The case was not argued with respect to whether the relevant terms of the DMC would, if allowed, defeat any law or that it would be contrary to public policy under s. 24(b) and (e) of the Contracts Act 1950.

[71] It was not her defence that the appellant developer cannot enforce the relevant provision in the DMC against her because the said provision is void in that if allowed, would defeat any law or is opposed to public policy. The respondent there relied on equitable defences such as estoppel, acquiescence and laches.

[72] The Federal Court in *Bandar Eco-Setia* (*supra*) was of the view that the DMC is a contract between the appellant and the homeowner and the homeowners *inter se* and decided the case based on the fact that knowledge of the obligations of the parties in the DMC is imposed on the respondent and she ought to have complied with the provisions. In other words, the Federal Court was considering the legal effect of a private agreement between a developer and its house buyer without having to concern itself with the issue of illegality *ie*, whether the relevant provision in the DMC which the appellant sought to enforce is unlawful and void, which if allowed, would defeat any law in particular the NLC or that it would be against public policy.

[73] Parliament has an interest in ensuring the orderly development of lands generally in the country and working together with the local authority where the land is situated, they are in the best position to plan and direct development in accordance with whatever structural plans they may have for

the district and the State for they have the overall big picture of development in the State. Moreover, they have no personal or profit motive unless a private entrepreneur or developer for they are members of the State Authority who are mainly elected representatives of the people or Federal or State civil servants. They would have in mind the low-density development of the area so as to maintain the forest reserve as well as preserving habitat and species native to the eco system.

[74] Vendors or developers of a master title which they have applied for subdivision and later sold to individual purchasers may want to have their grand project to make their subdivided lots more saleable at a premium price. However, for an orderly development they must seek the support, approval and consent of the relevant local authority and the State Authority of the relevant State for constitutionally, land is a State matter. Thus, if a developer wants to have a restriction in interest endorsed on the development, the way to properly do it is to have the said restriction endorsed on the subdivided titles stating expressly that there shall be no application for change of category of land use without the consent of the developer.

[75] No sooner have we explored such a delicate way forward without preventing the purchasers as proprietors from unlocking the value of their land than we appreciate the challenges involved because one cannot and should not subject the right to apply for change of category of land use to the consent to be had first from the vendor/developer.

[76] The moment we allow a vendor/developer to have rights inconsistent with that of a purchaser/proprietor under the NLC to prevail, then there is no end to possible abuse by the vendor/developer. A vendor may state, for instance, that for every subsequent sale, the consent of the vendor must first be obtained and that 10% of the subsequent selling price must be paid before the consent is granted. A vendor may even state that any charge created over the land must be from a banker recommended by the vendor and the solicitors for the loan transaction must be a solicitor approved by the vendor.

[77] The various possible permutations of the terms would be as varied as the creativity of the vendor would allow. A vendor may require the purchaser to only plant a certain type of fruit tree on the land, or the dwelling house to be built must be one of the six selected plans of the vendor. There is also nothing preventing the vendor from stipulating the colour of the paint for the dwelling house. Some extreme examples just to illustrate the point may range from fees to be charged for getting the consent of the developer to any subsequent transfer, or that the purchaser can only create a charge with a certain bank recommended by the developer, or that the purchaser must use the guard services as provided by the developer or agent subject to a 10% increase in the fees annually or that the purchasers may only grow Musang King durians and no other fruit trees. These examples underscore the dangers

that may come with allowing a restrictive contractual covenant to run alongside a sale of land where the title is finally registered in the purchaser's name.

[78] To allow such enforceable restrictive covenants would open the floodgates and send the wrong message to developers that they can impose all kinds of restrictive covenants for so long as the purchasers have signed those covenants.

[79] The plaintiff referred to the case in Victoria State, Australia in *Fitt v. Luxury Developments Pty Ltd* [2000] VSC 258 where the Supreme Court there upheld restrictive covenants created prior to the commencement of the Property Law Act 1928. That is understandable before a comprehensive land law comes into force and in our case, it is the NLC. Likewise, the principle in *Tulk v. Moxhay* (1848) 2 Ph 774 where restrictive covenants were upheld in cases prior to any legislative intervention on the matter cannot be applied where they are repugnant or inconsistent with a comprehensive land code like here in the NLC. See the Federal Court case of *Tam Kam Cheong v. Stephen Leong Kon Sang & Anor* [1979] 1 LNS 108; [1980] 1 MLJ 36.

[80] Thus such terms and conditions attaching to the sale of the land would unduly encroach onto the purchaser's and proprietor's right of use and dealings with his land. The protection afforded to the proprietor of land would have been effectively denuded and destroyed altogether. It is for the proprietor to decide what he wants to do with his land for so long as he does it in compliance with the express and implied conditions of land use.

[81] A developer who wants to develop a big piece of land into an eco forest park and orchard or a community living with gated and guarded facilities, for instance, should apply for a strata development of the land such that the local authority working together with the Ministry of Housing and Local Government and the State Authority would ensure that the subdivided strata titles when issued, would have the express condition of land use endorsed on the subdivided strata titles. The proprietors of the strata titles of the landed properties would then have the autonomy to decide in the management corporation ("MC") that will be formed as to what are the terms of the DOC that they want to adopt as by-laws by way of resolutions passed at the AGM or EGM of the MC.

[82] Under the Strata Management Act 2013 ("SMA"), strata development is not just for high-rise buildings but also for "any land on the same lot intended to be subdivided into parcels to be held under a separate strata title" as defined in s. 2 under "building or land intended for subdivision into parcels".

[83] Thus, anyone intending to buy such a land would be able to know from a search of the strata title and their enquiry from the MC as to what are the by-laws applicable that would bind all purchasers. Otherwise, what

A we have, which is the case now, is that a prospective purchaser would not know of any conditions that bind the land as it would not be reflected in a title search which would only reveal the express conditions and restrictions in interest; not knowing that the original seller has sought to bind subsequent buyers to the DOC. In fact, subsequent buyers would not be bound by the
B terms of the DOC unless they have signed it. If the original seller seeks to sue for damages for breach of the DOC, that would not prevent a subsequent purchaser from buying the land free from all restrictions contained in it. In other words, it is a very ineffective way of doing what the original vendor intended with only a claim for damages if at all the vendor can prove the
C damage suffered after having received the purchase price in full from the original purchaser.

[84] When there is a legal and proper way for such a development of landed property to be undertaken by way of strata development of the landed property, the vendor holding itself out as a developer should not seek to use
D a method not envisaged and endorsed under the NLC to bind subsequent purchasers and so if possible, to prevent the change in the character of the development.

[85] There is yet another disquieting feature in this "development" for we hear that the developer themselves have their own building erected on their
E portion of the land where they alone could exclusively offer accommodation and restaurant facilities to guests be it under an AirBnB concept or on an otherwise commercial basis. If that is true then it is the vendor's method of warding off competition where eco-tourism business is concerned. The valid question raised by the defendants and others like them would be why are they
F not allowed to unlock the value of their land especially when they have the approval of the local authority and land office. According to D1, other resorts in the development are Cherengin Hills Convention, Mandara Tree Villas, D'Villa, Seren Resort and Training Centre. The local authority and the State Authority are the best Government agencies to decide on whether
G what is applied for in terms of the change of category of the land and the construction of a building on the land sought to be converted from "agriculture" to "building" would be conducive and consistent with the overall development and land use in the district of Janda Baik.

[86] What the developer seeks to do here is not just to bind the purchaser
H in perpetuity but also subsequent purchasers, and while they can themselves apply for conversion to "building", the rest of the purchasers cannot and it does not matter if every single one of the purchasers has agreed that they do not want to be bound by the prohibition not to apply for conversion to "building".

I **[87]** Such a term would be suffocating, oppressive, unfair and unreasonable, for there is no system for the purchasers to decide on the future direction of the "project", unlike a case of strata development of landed

properties whereby passing the relevant resolution at the meeting of the management corporation formed, the purchasers have the autonomy and authority to decide to chart their future direction and to unlock the value in their land with the approval of the local authority and the land office.

[88] The rights of proprietors over their land is also protected constitutionally in art. 13 of the Federal Constitution in that there is no compulsory acquisition without reasonable compensation and surely conversely there cannot be a denuding or deprivation of one's statutory rights that comes with ownership of land purchased. Upon sale, the vendor loses all his statutory rights that were previously attached to the land. To bind the purchaser and subsequent purchasers, the contractual waiver of such a right must be reflected against the title for then the relevant authorities in the local authority and land office can weigh in on whether such a prohibition is reasonable.

[89] We do not think that s. 206(3) of the NLC which reads that nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to any alienated land or interest therein, can be stretched and read us as permitting the continuing operation of the restrictive covenants once the title is already registered in the purchaser's name as the proprietor of the land and the vendor has received its full purchase price and thus has no more interests or rights over the land.

[90] We are of the considered view that to allow the term of the DOC to be enforced by the vendor would be to defeat the law under s. 24(b) of the Contracts Act 1950. Any term of a contract that violates s. 24(b) of the Contracts Act 1950 would have to be struck down and it would be a very rare case where a court of law would uphold a contract which is repugnant to statutory rights, in this case, the NLC.

[91] Having decided that cl. 1.2 of the DOC, the main plank of the plaintiff's case is void by virtue of s. 24(b) of the Contracts Act 1950, the other clauses that have a similar effect of defeating the purpose of the law would have to fall too.

[92] It is an incident of registered proprietorship that a proprietor of a piece of land shall have unencumbered and unrestricted rights to deal with his land subject only to any interests as may be registered and any conditions and restrictions of interest as may be endorsed on the subdivided title. After all, s. 214 of the NLC gives a registered proprietor the absolute right to deal with his land and in particular, to transfer it as follows:

> **214. What may be transferred, and restrictions on exercise of powers.**
>
> (1) Subject to sub-section (2), the following shall be capable of transfer under this Act:
>
> (a) the whole, but not a part only, of any alienated land;

A (b) the whole, but not a part only, of any undivided share in alienated land;

(c) any lease of alienated land;

(d) any charge; and

B (e) any tenancy exempts from registration.

(2) The powers conferred by sub-section (1) shall be exercisable in any particular case subject to:

(a) **any prohibition or limitation imposed by this Act or any other written law for the time being in force;**

C

(b) **any restriction in interest to which the land in question is for the time being subject;** and

(c) in relation to leases, charges and tenancies exempt from registration, the provisions thereof, express or implied, … (emphasis added)

D **[93]** It is not subject to any contractual restrain or prior consent of any third party which in any event does not bind the new registered proprietor. In this case, the wife, D2 had transferred her Lot A324 to the husband, D1, who is now the subsequent registered proprietor of Lot A324. Clause 13(2) of the S&P cannot stand in the way of the new registered proprietor having free and uninterrupted enjoyment of his land.

E

[94] As for the use of the land for commercial purposes, the category of land use is now "Building (Commercial - Resort)" and so the commercial activities carried out by offering Peppaville Resort for rent would be within the law as administered and enforced by the land office and the local

F authority. The local authority in granting the relevant licence to operate the business may, at its discretion, set conditions so that users of the place respect the forest park, its facade, ambience and ecosystem.

[95] If the defendants had become an annoyance or nuisance to the plaintiff and the neighbourhood then the plaintiff would have their remedy under the

G law in reporting to the law enforcer in the local authority. No cogent evidence was led to sustain a civil claim for damages for nuisance and no purchasers had come to give evidence of the nuisance they had to put up with.

[96] We are of the considered view that the various clauses referred to in

H the S&P and the DOC, which the plaintiff complained that the defendants had breached are in the nature of terms which, if enforced, would defeat the relevant provisions of the NLC and the policy of the Torrens system of registration of land titles where the title and all the terms and conditions and restrictions in interest endorsed on it is everything. The clauses highlighted

I are void and unenforceable under s. 24(b) of the Contracts Act 1950.

Whether The Term In The Contract Prohibiting Application For Change Of Category Of Land Use Would Be Void And Unenforceable Under s. 24(e) Of The Contracts Act 1950 As Being Contrary To Public Policy

[97] To determine if such a prohibition would be contrary to public policy, one must keep abreast with the relevant legislation in this field of a purchaser's right with respect to land before its subdivided title is issued. There had been a chorus of complaints from purchasers who, when they purchased land from a developer or a vendor in a housing or landed development, the vendor would often time have a clause in the S&P or DOC that allowed contractually the vendor to impose an administrative charge of 1% or even more of the subsequent purchaser price should the first purchaser decide to sell his land or completed property to a subsequent purchaser before the original developer or vendor consents to the subsequent sale. As the subdivided titles have not been issued yet, no subsequent purchaser would want to risk the subdivided title not being able to be registered in its name but registered instead in the name of the first purchaser.

[98] An amendment was made to the HDA and a new section was incorporated to criminalise the act of the original developer or vendor to require its written consent to a subsequent sale and to impose a fee to be paid for the consent to be given. The amendment has done away with the need to obtain the original developer's consent such that what is required is merely for the original purchaser to notify the developer of the subsequent sale and all that the developer is allowed under the law to charge is a mere RM50 for the administrative charge of updating its sale record as well as to make various confirmations if there had been previous sale or assignment of the property.

[99] This amendment was brought about on 12 April 2007 by the Housing Development (Control and Licensing) Amendment Act 2007 (HDA 2007 Amendment). A new s. 22D was introduced that reads as follows:

> **22D. Assignment**
>
> (1) For the avoidance of any doubt, *an absolute assignment in writing, under the hand of the assignor of the housing accommodation,* not purporting to be by way of charge only, of the proprietary right or interest in the housing accommodation and the legal chose in action in the sale and purchase agreement in respect of a housing accommodation, *of which express notice in writing has been given to the housing developer by the assignor* in the manner set out in subsection (2) *shall be deemed to have been effectual in law to pass and transfer the proprietary right,* interest, chose in action and all legal and other remedies for the same to the assignee, from the date of the receipt of such notice by the housing developer, and *the concurrence of the housing developer shall not be required.*

(2) Subject to subsection (8), every notice of assignment given to the housing developer pursuant to subsection (1) shall be delivered by the assignor or his solicitors to the housing developer at or after the completion of the sale and purchase between the assignor and the new purchaser of the housing accommodation and shall be accompanied by:

(a) duly stamped sale and purchase agreement between the assignor and the new purchaser of the housing accommodation, if any;

(b) duly executed deed of absolute assignment between the assignor and the new purchaser of the housing accommodation together, if applicable, with a letter of undertaking from the new purchaser or the new purchaser's financier, as the case may be, to deliver the duly stamped deed of absolute assignment within fourteen days after the same has been stamped;

(c) full payment of all sums and outgoings due to the housing developer under the sale and purchase agreement.

(3) *A housing developer shall keep and maintain an up-to-date, proper and accurate register of all purchasers of the housing accommodation* until separate or strata titles for all the housing accommodation in the housing development have been issued by the appropriate authority and registered in the names of all the purchasers of the housing accommodation in that housing development.

(4) *The housing developer shall provide all necessary and accurate confirmation of the records in the register whenever requested by a purchaser of the housing accommodation or his solicitors or his financier or his financier's solicitors subject to a payment of a fee not exceeding fifty ringgit* or such amount as may be prescribed from time to time for meeting every request for confirmation in respect of all of the following:

(a) full particulars of the housing accommodation;

(b) the postal address of the housing accommodation;

(c) the current purchaser of the housing accommodation;

(d) the current chargee or assignee of the housing accommodation;

(e) the total amount due to the developer under the sale and purchase agreement as at the date of the confirmation; and

(f) such other matter as may be prescribed from time to time.

(5) *Any person who requires any consent from a housing developer to any absolute assignment or assignment by way of charge in contravention of subsection (2) shall be guilty of an offence* and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(6) Any housing developer who:

(a) requires any consent to any absolute assignment in contravention of subsection (1);

(b) *imposes any condition to any absolute assignment* or assignment by way of charge *including requiring the new purchaser to execute any additional agreement or make any other payment in contravention of this section*;

(c) fails to comply with subsection (3); or

(d) fails or refuses to provide any confirmation in contravention of subsection

(4) or imposes any condition or any other fee in respect of any matter arising from subsection (4), *shall be guilty of an offence* and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(7) For the purpose of this section, references to "new purchaser" wherever appearing shall include a purchaser's financier or any beneficiary under the estate of a deceased purchaser or an assignee under an absolute assignment whether with or without consideration.

(8) The expression "completion of the sale and purchase" in subsection (2) in relation to a deed of absolute assignment executed in favour of a purchaser's financier or any beneficiary under the estate of a deceased purchaser or an assignee under an absolute assignment whether with or without consideration not in pursuance of a sale and purchase agreement shall mean the date of that deed of absolute assignment in which case paragraph (2)(a) shall not apply.

(9) *This section shall apply to any housing accommodation where separate or strata title for the housing accommodation has not been issued by the appropriate authority.*
(emphasis added)

[100] The above amendments were to address the period between the S&P and the issuance of the individual subdivided title or strata title of land or high-rise development where the purchasers and subsequent purchasers would be most vulnerable to the developer/vendor who would require their consent first to be obtained and conditions to be met before the consent is given.

[101] These may well range from paying exorbitant administrative fees to provide the relevant information and confirmation of the first sale as well as requiring the subsequent purchaser to sign an additional document in the form of a DOC. All these requirements of seeking consent and imposing additional conditions requiring subsequent purchasers to sign additional agreements with the developer/vendor have now been made into a criminal offence.

[102] The plaintiff had in cl. 12 of the S&P under "consent to assign" provided as follows:

> Until the registration of the transfer of the Property to the Purchaser, the Purchaser shall not in any manner whatsoever transfer or assign … the Purchaser's rights duties or obligations under the Agreement and/or sell, transfer, assign … the Property ... without the prior written consent of the Vendor … PROVIDED THAT in granting such consent, the Vendor shall be entitled to charge the Purchaser an administrative fee not exceeding one percent (1%) of the consideration for such disposal and to impose such conditions thereto as the Vendor shall deem fit and necessary AND PROVIDED FURTHER THAT such consent shall be subject to the execution of the Covenants by the Purchaser's sub-purchaser.

[103] After the subdivided title or strata title has been issued, and the purchaser registered as the proprietor against the title, the original developer or proprietor is already out of the picture, and hence there is no need for this statutory protection for one cannot envisage how the original developer or proprietor could still exact the requirement of consent for any subsequent transfer of the land or property.

[104] Realising that there would be developers who say that they are not a "developer" within the meaning of the HDA and hence are not bound by the amendments, the HDA 2007 Amendment also redefined "housing development" as follows:

> means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or **the sale of more than four lots of land** or building lots **with the view of constructing more than four units of housing accommodation.** (emphasis added)

[105] There is a discernible change in the definition for prior to the HDA 2007 Amendment, the definition of "housing development" meant "the sale of more than four units of housing lots by the land owner or nominee with the view of constructing more than four units of housing accommodation by the said land owner or his nominee". In the HDA 2007 Amendment, the words "by the said landowner or his nominee" are deleted.

[106] Thus, it would apply to the sale of bungalow lots or even vacant land where the purchaser is expected to construct his own dwelling house on the agricultural land from one of the six approved building plans of the developer. The construction of a dwelling house on an agricultural land is permitted under s. 115 of the NLC as follows:

115. Implied conditions affecting land subject to the category "agriculture"

(1) Where any alienated land is subject by virtue of any provision of this Act to the category "agriculture", the following implied conditions shall, subject to sub-section (3), apply thereto:

(a) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes specified or referred to in subsection (4);

(b) …

…

(4) The purposes referred to in paragraph (a) of sub-section (1) are the following:

(a) **the purposes of a dwelling-house for the proprietor of the land** or any other person lawfully in occupation thereof, or for the servants of, or any persons employed for agricultural purposes by, the proprietor or any other such person:

Provided that the dwelling-house for the proprietor of the land or any other person lawfully in occupation thereof **shall not occupy more than one-fifth of the whole area of the land or two hectares,** whichever is the lesser; … (emphasis added)

[107] In fact, the developer here requires the purchaser by way of an undertaking to so erect a dwelling house and complete the same within three years from the date of delivery of vacant possession of the property to the purchaser or within three years from the issuance of the final title whichever is the latter as provided for in cl. 14(4) of the S&P. The developer has acknowledged that the construction of a dwelling house is a right of the purchaser under s. 115 of the NLC.

[108] Assuming for a moment that a vendor or developer of a big plot of agricultural land like the plaintiff here, need not apply for a developer's licence or approval of its development order or plan for the sale of the subdivided lots to more than four purchasers who are then required to undertake to construct their dwelling houses on the land, then it must live with the reality that as the prohibition on change of category of land use did not find its way into the subdivided title, its contractual right to enforce this prohibition ceases.

[109] Where the title is everything under the Torrens system of title by registration, the developer at the very least must, in their application for subdivision, apply for a restriction in interest to be endorsed in all the subdivided titles that there shall be no application made for change of category of land use and that any transfer of the land shall be with the prior consent in writing of the original proprietor/developer.

[110] We doubt such a restriction in interest would have been allowed by the State Authority for such restrictions would unduly affect the purchasers' rights under the NLC. Section 136(1) with respect to conditions for approval of subdivision provides as follows:

> 136. Conditions for approval of sub division.
>
> (1) No sub division shall be approved by the State Director or, as the case may be, Land Administrator unless the following conditions are satisfied:
>
> (a) that the sub division would not contravene any restriction in interest to which the land is for the time being subject;
>
> *(b)* that the sub division *would not be contrary to the provisions of any written law for the time being in force, and that any requirements imposed with respect thereto by or under any such law have been complied with;*
>
> (c) without prejudice to the generality of paragraph (b):
>
> (i) that any necessary approval of any planning authority has been obtained, and
>
> (ii) that *the sub division would not be contrary to any plan approved by the State Authority for the development of the area in which the land is situated, or to any decision of any planning authority for that area,* and
>
> (iii) if the case falls within any direction in that behalf given by the State Authority, that the sub division has the consent of anybody or authority specified in, or appointed by, the direction;
> … (emphasis added)

[111] The State Authority would be in the best position to decide if prohibiting the purchasers of the subdivided lands from applying for a change of category of land use to "building" would be contrary to any plan approved by the State Authority for the development of the area in which the land is situated. What the developer cannot do officially and legally, they cannot seek to do by the back-door method under a so-called contractually agreed waiver of those rights by the purchasers.

[112] The need for the amendment to criminalise the act of a developer requiring its prior consent for subsequent sale subject to additional conditions that may be imposed would reflect the public policy that such clauses are illegal, null, void and unenforceable. Parliament takes the view that these purchasers of housing accommodation in housing development are the ones that require the most protection from the law.

[113] The rest may have the means and resources to affect their protection through a court action or suit and they would be purchasers of commercial and industrial units and agricultural land such as the defendants here.

[114] The criminal offence, even if read strictly to cover those cases of housing development under the HDA and not cases of sale of agricultural land, would still underscore the public policy of striking down clauses that

require the consent of the developer/vendor to a subsequent transfer where the developer/vendor had already received its full purchase price and where for its own self-serving interest, it is prohibiting its purchasers and even subsequent purchasers from unlocking the value of their land by converting it from "agriculture" to "buidling" without destroying the character of the land or that of Tanarimba Janda Baik.

[115] It is the local authority working in tandem with the State Authority that is best placed and positioned to determine the overall direction of the development of that area of agricultural land and unlike a private developer who may not want other purchasers to conduct commercial activities on the land other than itself, the local authority is free to decide without having such personal and private interest to reckon with.

[116] It would be against public policy for a developer/vendor who has contracted to take away the statutory rights of a weaker party to now seek the court's assistance for an equitable remedy of specific performance to be given for the enforcement of the waiver of such a statutory right. We would be sending a wrong message if we were to allow such a term to be enforced which has the effect of taking away a statutory right which is part of the incidents of ownership of land.

[117] At the most, the plaintiff may have a claim in damages, assuming for a moment it is a purely personal right that could be waived, if it could prove damage suffered, which it has not as discussed further below.

Whether There Are Other Reasons For Dismissing The Plaintiff's Claim For Specific Performance And For A Mandatory Injunction To Demolish The Longhouses Built Straddling The Two Pieces Of Land

[118] The lot that the wife transferred to the husband after the subdivided title was issued, cannot be the subject matter of the demolition because under the doctrine of privity of contract, the plaintiff did not sign a subsequent DOC with D1, the husband, concerning Lot A324. At most, the plaintiff may sue for damages for breach of the DOC which we had already said, has been superseded by the terms as endorsed on the subdivided title issued and, on the title, there is no such prohibition on applying for change of category of land use.

[119] The plaintiff had not proved what loss it had suffered as a result of such an act of D2, assuming for a moment there is a breach. There is no evidence to show that prospective purchasers changed their minds on purchasing the moment they saw the building on D1's land. There is no evidence that other purchasers have complained and the evidence adduced is that other purchasers have also begun to build on their lands. Perhaps if there had been no such prohibition against applying for a change of category of land use, more purchasers would be keen to purchase. Ultimately, it is still

A up to the land office and the local authority respectively to decide on whether to grant the change of category of land use and the type and size of the building that is permitted. As to whether business may be done on the premises as in letting out on a short term, basis in a kind of AirBnB concept, that again is for the local authority to decide.

B **[120]** The wife is a separate legal person from the husband, and what she is presumed to know with respect to the prohibition on the conversion of the land is not binding on the husband under the doctrine of privity of contract, where only parties to the contract are bound and have a cause of action in contract. Neither can the husband's notice of this prohibition because he C himself has another S&P and DOC for Lot A323 which he purchased direct from the plaintiff, be binding on him with respect to Lot A324 because he had no DOC signed with the plaintiff for Lot A324. We do not think that for a claim under contract in this case, the plaintiff can rely on the constructive knowledge of the husband with respect to the need to sign a fresh D DOC with the plaintiff for Lot A324 that he purchased from the wife.

[121] Thus, the part of the long house built on Lot A324 which originally belonged to his wife, cannot be the subject of the demolition as Lot A324 is now in D1's name, the husband, who had not signed any DOC with the plaintiff for Lot A324.

E **[122]** As for Lot A323, even assuming that there was a breach of the relevant terms of the DOC, which we have held not to be binding on him, once the subdivided title had been issued without such a prohibition or restriction, the plaintiff had failed to prove what loss it had suffered. No one had come forward to testify that they had changed their mind on buying after knowing F that others could apply for change of category of land use to "building" or that any of the existing purchasers have raised their objections and threatened to sue the plaintiff.

[123] We agree that the construction of the long house was not done surreptitiously as there were the plaintiff's guards who would have to grant G permission for the lorries to enter the development, bringing in the building materials. Under cl. 2.8 to the second schedule of the DOC, the covenantor shall prior to the commencement of on-site construction works of the house apply to the developer for identification tags for its contractors, sub-contractors or agents.

H **[124]** Moreover, under cl. 3.1 of the DOC a construction deposit had to be paid to the developer as "security for the compliance and performance by the covenantor or his contractors or servants of the obligations stipulated (in the DOC) and in the construction guidelines during the construction of the house." The construction deposit of RM20,000 was duly paid by D1 to the I plaintiff.

[125] The plaintiff could easily have obtained an injunction to stop the construction if it had wanted to object to the construction of what is not from one of its six selected plans provided for the dwelling house. D1's contractors were allowed by the plaintiff to enter the lands to do the construction work and after the building was completed the building deposits were refunded to the defendants.

[126] Clause 14(11) of the S&P permits the purchaser to submit his own building plans for a dwelling house to the vendor for the vendor's approval and upon approval such approved building plans shall be deemed to be the selected plan. Whilst the approval is stated to be at the vendor's absolute discretion, in a case where the vendor has not objected to the construction and has refunded the construction deposits of RM20,000 after the completion of the construction, the vendor is deemed to have waived the formal requirements of having to obtain its prior approval first before construction.

[127] After all cl. 2.4 in the second schedule to the DOC provides that the said deposit shall be refunded if all the construction works have been carried out to the satisfaction of the plaintiff vendor. It reads:

> Within fourteen (14) days from the date of receipt by the Developer of a certified true copy of the Certificate of Fitness for Occupation of the House as issued by the Appropriate Authority and *all construction works being carried out to the satisfaction of the Developer, the Developer shall refund to the Covenantor the Construction deposit or any sum remaining thereof free of interest.*
> (emphasis added)

[128] The said construction deposit was refunded and returned to the defendants on 16 January 2017 without any deductions and so the plaintiff is estopped from now contending that the defendants had breached the terms of the S&P and the DOC with respect to the proper construction of their dwelling house on the two lots of land.

[129] This court is at liberty to look at the big picture and to note that the building plans had been approved by the local authority as required under cl. 14(5)(a) of the S&P and a certificate of fitness for occupation had been issued by the local authority. This suit that came much later appeared to be an afterthought seeing the popularity of the business of the defendants and the interest it has generated in its social media which the plaintiff referred to as Peppaville.com, Agoda, booking.com, Facebook and AirBnB. If the defendants had violated any conditions of land use for commercial activities, it is for the local authority to take action against them. After all the new category endorsed on the titles referred to "Building (Commercial - Resort)."

[130] Moreover, in the frequently asked questions in the marketing brochure of the plaintiff we find the following questions and answers:

A Q: Can a purchaser use its own designs?

A: A purchaser may use its own architect and building plans, subject to the prior written approval of the Developer.

[131] The plaintiff in para. 9 of its "reply to defence and defence to the counterclaim" admitted para. 4.17 of the defendants' "defence and counterclaim" that the plaintiff had issued a letter dated 2 August 2012 agreeing not to enforce cl. 14(4) and 14(10) of the S&P. The relevant parts of the letter reads: "We write to confirm that we will not enforce cl. 14(4) and 14(10) of the Sale and Purchase Agreement on the aforesaid property." However, the plaintiff's stand in para. 9 of its "reply to defence and defence to the counterclaim" is that the non-enforcement is only with respect to the timeline to build the dwelling house.

[132] We cannot fault the defendants for taking the waiver of enforcement of cl. 14(4) of the S&P to include waiver of the need to comply with the design prescribed by the developer in the selected plan and not just the extension of time to construct the dwelling house. After all, the defendants' intention was to realise a good return on their investment as soon as possible and not the problem of time to complete the dwelling house. As the S&P was drafted by the developer, any ambiguity had to be resolved contra-proferentum in favour of the purchasers who would in their layman's understanding, have understood that the whole of cl. 14(4) of the S&P would not be enforced against them for it reads:

> The Purchaser hereby undertakes that a dwelling house, *which is of the type, design and specification contained in the Selected Plan subject to any variation under sub-clause (3) above,* shall be erected and completed (as certified in an Architect's Certificate of Practical Completion) by the Purchaser on the Property at the Purchaser's own cost and expense, *as permitted under Section 115 of the National Land Code, 1965 within three (3) years from the date of delivery of vacant possession of the Property by the Vendor* to the Purchaser or within three (3) years from the date of issuance of the final title in replacement of the qualified title to the Property by the Appropriate Authority, whichever is the latter. (emphasis added)

[133] Delay defeats equity and here D1 had expanded some RM400,000 for the conversion exercise and another RM10 million plus for the construction of the long house. If the plaintiff were serious in enforcing the relevant terms by way of specific performance, it must act promptly by applying for an interim injunction to halt the construction.

[134] Bearing in mind that specific performance is an equitable remedy, the delay in applying for it and which application was made after the completion of the building would militate against any remedy of specific performance and more so when the term in question has the effect of taking away D1's statutory right of applying for change of category of land use and where the completed building has the approval of the local authority on land which category of land use is now "building".

[135] It is for the plaintiff to show what loss it has suffered and it has failed to and, in any event, even for an agricultural land, the proprietor has the right to build a dwelling house on it for so long as it does not exceed 1/5 of the whole area of the land. There is no evidence that what had been built exceeds 1/5 of the land area in Lot A323. Even if it does, the order should only be to confine the demolition of the dwelling house such that it does not exceed 1/5 the area of the land. The plaintiff had clarified in the "frequently asked question" in their marketing brochure the following:

> Q: Is there a restriction on the size of the house?
>
> A: The footprint of the house should not occupy more than one-fifth of the total area of the lot.

[136] Here again, we must reiterate that it does not comport with the equitable relief of specific performance when what had been constructed had been approved by the local authority and that the plaintiff no longer has any interest in the two pieces of land in question and correspondingly could not show how it had suffered any loss. The trial judge had made a finding that the plaintiff had not proved the various heads of damages claimed, and we see no good reason to interfere with that finding of fact.

Decision

[137] For all the reasons averted above, the plaintiff's claim against the defendants cannot stand and we had allowed the defendants' appeal and set aside the order of the High Court after having satisfied ourselves that the High Court had erred. We would grant the defendants the reliefs they prayed for in their counterclaim in paras. 22(i) to (vi) of their defence and counterclaim.

[138] The prayers are essentially for a declaration that the various clauses in the S&P and DOC which have the effect of prohibiting the defendants from applying for subdivision and amalgamation and change of category of land use from agriculture to building are null, void and unenforceable as being contrary to ss. 135, 146 and 124 of the NLC. There was also a prayer that the conditions imposed on the construction of a dwelling house are contrary to s. 115 of the NLC and are null, void and unenforceable and that the defendants do have the right of quiet enjoyment and use of the land in Lot A323 and Lot A324.

[139] We had also allowed costs of RM50,000 to the appellants as costs here and below subject to allocator.